

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Florida Power & Light Company (FPL) for authority to charge FPL rates to former City of Vero Beach customers and for approval of FPL's accounting treatment for City of Vero Beach transaction.

DOCKET NO. 20170235-EI

In re: Joint petition to terminate territorial agreement, by Florida Power & Light and the City of Vero Beach.

DOCKET NO. 20170236-EU

October 12, 2018

CIVIC ASSOCIATION OF INDIAN RIVER COUNTY, INC.[CAIRC]  
MOTION FOR RELIEF FROM RESCHEDULING OF PROCEEDINGS IN LIGHT  
OF CONFLICTS WITH HEARING DATES

CAIRC, pursuant to Florida Rules of Civil Procedure, Florida Administrative Procedures Act, Chapter 120 Florida Statutes [2018], and associated case law, hereby files this Motion for Relief from Rescheduling of Proceedings of the hearing in the above docket and to allow sufficient time coordinate mutually reasonable dates for re-setting same, and in support thereof states as follows:

1. CAIRC counsel and many of its witnesses have to travel from Vero Beach to Tallahassee to present themselves for cross-examination and for rebuttal support of all of our issues, and also has outstanding motions to be determined on discovery and standing.

2. Owing to the state of emergency declared for Hurricane Michael, the Public Service Commission on the afternoon of October 8 canceled the hearing for this docket scheduled for October 9 at 9 a.m.

3. CAIRC had previously requested a change of date for this hearing via Motion dated and filed October 8, 2017. CAIRC at the start of this new proceeding had also requested moving the hearing date that was originally set for October 10-11, 2018.

[See attached emails of July 26, 2018, where discussion among the parties about CAIRC counsel's conflict with October 11 date.] As can be noted in the attached emails, the PSC docket was already taken for the next week by important [hurricane] business, as was asserted by staff and mentioned by FIPUG, and FPL refused any change to a date later than October 11, presumably owing to reasonable scheduling conflicts of their own. As there was no possibility of any dates for the following week [October 15-19], CAIRC filed a Motion on July 27, 2018, to Move Hearing date, that would move the date back one day, and served to all parties at that time. This Motion was granted.

5. After the timeline was set, all CAIRC witnesses, and likely all other witnesses, then made their plans to attend accordingly. CAIRC witnesses are unique from other party witnesses, however, in that they are not employed by one of the parties and supported financially in taking their roles as a witness. CAIRC's two main witnesses, Jay Kramer and Ken Daige, both own and run their own businesses that are dependent on contracts being met and many scheduling demands placed on them by clients. Their schedules were cleared for the October 9-10 dates but were subsequently over-subscribed for the following week in which we now find our attentions focused. Additionally, CAIRC is unaware of the ability of any witnesses planning to appear during the public testimony portion of the hearing to attend on the new dates, and allowing reasonable accommodation for same is also part of the PSC agenda since it has added this portion of the hearing to our case at the request of the City of Vero Beach.

6. Mr. Kramer has scheduled travel out of the state for business, and Mr. Daige's schedule has several deadlines he needs to meet for customers, as well as an out-of-town trip that cannot be delayed.

7. As shown above, CAIRC has gone out of its way, to its own detriment, to work within this exceedingly shortened docket time frame provided to benefit FPL. CAIRC also was previously alerted to the fact that the week of October 15 was an impossibility for both FPL and for the Commission. Therefore, CAIRC relied on that information in setting its other business schedules.

8. Staff did check with CAIRC counsel on Monday, October 8, to ascertain when she would be returning from her travel [Monday, October 15, 2018], but did not ask her for any other issues with availability. A FAR Notice was filed at 2:48 p.m. on the docket page re-setting the hearing dates for the week, October 18-19. [The Notice states it is “continuing” the hearing, but the hearing never commenced. It is a re-setting of the dates.]

9. Hurricane Michael intervened at that point, but CAIRC set about trying to manage this unexpectedly quick re-set on a previously impossible pair of dates. CAIRC quickly ascertained the above-noted conflicts. CAIRC counsel is also disadvantaged greatly by having to adjust her own client demands. Ms. Larkin is counsel in an arbitration case before the Department of Business and Professional Regulation [“DBPR”] (Case No. 2018-02-3903) that needs to take immediate action in circuit court owing to recent actions by the opposing party. This involves filing an emergency request for temporary restraining order/injunctive relief, and is time sensitive. Since the PSC website has been down until now, CAIRC could not file any motion on this matter until today.

10. While FPL is indeed a large, well-staffed and financially sound entity that does much business in front of this Commission, we know that the Public Service Commission considers all parties equally, as would any court of law. CAIRC needs very sincerely to request some consideration for their position at this time. Our work,

research, and many contributions to this docket are seriously important, to our members and to the truth-finding efforts here being made. CAIRC is quite sure they cannot be effective without their witnesses, experts, and support personnel.

11. CAIRC would also suggest that being able to depose witnesses or have time to submit further interrogatories, since the City, County, and Shores have entered no direct testimony on our issues, would be possible if more than seven days existed after such a disruptive delay of the hearing. This could limit, or even eliminate, the need for extensive cross-examination during the hearing itself. CAIRC is unaware of the reasons for the original grant of such a shortened timeline that only benefits FPL, but CAIRC would be most grateful if at this point an adjustment could be made in their favor. Staff and the Commissioners have been very patient in having a party in this docket that is learning their unique system while trying to cope with certain demands that everyone else might find “normal,” but it seems clear that even seasoned practitioners at the Commission would be greatly disadvantaged by such a scheduling nightmare. CAIRC’s rights to due process are now being infringed.

#### STATEMENT OF LAW TO SUPPORTING ARGUMENTS

12. As a petitioner party in this docket, CAIRC is entitled to all rights and relief accorded any party to a PSC matter. Fla. Admin. Proc. Act Sec. 120.57 (2018).

13. CAIRC is entitled to the full evidentiary hearing it requested, with a reasonable opportunity for discovery and a reasonable opportunity to be heard. See Citizens v. FPSC, 146 So.3d 1143 (Fla. 2014) in which Citizens opposed creation of a rushed hearing track claiming it denied due process to party where an interim settlement agreement made by FPL and other intervenors replaced an actual hearing on all the issues, discussing due process under Fla. Stat. 120.57(1)(b). In this 2014

case, however, there had already been 10 days of hearings and full discovery had been conducted. In speaking about due process in the 2014 case, the Supreme Court stated:

As this Court has noted in the past, “[t]he extent of procedural due process protections varies with the character of the interest and nature of the proceeding involved.” *Hadley v. Dep’t of Admin.*, 411 So.2d 184, 187 (Fla.1982) (citing *In Interest of D.B.*, 385 So.2d 83, 89 (Fla.1980) ). Although this Court has stated that there is no single test to determine whether the requirements of due process have been met, see *Hadley*, 411 So.2d at 187, “[t]he fundamental requirements of due process are satisfied by reasonable notice and a reasonable opportunity to be heard.” *Fla. Pub. Serv. Comm’n v. Triple “A” Enter., Inc.*, 387 So.2d 940, 943 (Fla.1980) (citing *Ryan v. Ryan*, 277 So.2d 266 (Fla.1973) ; *Powell v. State of Ala.*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932) ; *Dohany v. Rogers*, 281 U.S. 362, 50 S.Ct. 299, 74 L.Ed. 904 (1930) ). Further, due process cannot be compromised “on the footing of convenience or expediency.” *United Tel. Co. of Fla. v. Beard*, 611 So.2d 1240, 1243 (Fla.1993) (quoting *Fla. Gas Co. v. Hawkins*, 372 So.2d 1118, 1121 (Fla.1979) ).

Citizens at 1154 [highlighting added].

14. The Court also noted regarding hearing procedures:

Pursuant to section 120.569(1), the provisions of section 120.569 “apply in all proceedings in which the substantial interests of a party are determined by an agency...” In the event that there are disputed issues of material fact to be determined, an adversarial hearing must be provided under section 120.57, after reasonable notice is given not less than fourteen days before the hearing. § 120.569(2)(b), Fla. Stat. (2012) ; see also *Survivors Charter Sch.*, 3 So.3d at 1231. The notice must contain the time, place, and nature of the hearing and the legal authority under which the hearing is to be held.

Citizens at 1155 [highlighting added].

15. As noted, the Court cites to Sec. 120.57(1)(b), stating:

All parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, to submit proposed findings of facts and orders, to file exceptions to the presiding officer's recommended order, and to be represented by counsel or other qualified representative.

Id.

16. As noted above, CAIRC counsel has immediate and pressing needs on another case demanding her attention. CAIRC has not been able to coordinate this request with either Staff or the Citizens, as Tallahassee has been “closed for repairs” since October 9. CAIRC counsel would be greatly disadvantaged by being forced participate in an October 18 hearing without any support nor any expert witnesses to assist with her cross examination.

17. Owing to the shortened timeline granted to FPL in this case, neither the Commission nor FPL and its cohorts should be able to use their chosen compacted timeline to bypass constitutional due process requirements. See United Telephone v. Beard, 611 So.2d 1240, 1243 (Fla. 1993) (in case where Commission chose a path of a limited proceeding, it cannot “now re-designate the outcome of that prior proceeding as an "interim award" in order to bypass constitutional due process requirements” and thereby deny the minimal requirements of a fair hearing).

18. In our case now at issue, CAIRC has already been denied sufficient time to conduct and complete discovery. See pending Motion for Reconsideration of Grant of Protective Order on deposition. CAIRC is unaware of the basis, constitutional or otherwise, for the prior grant of this compacted timeline and cannot find any such basis set out in any Order of this Commission. However, this path was chosen and not by CAIRC, although we have worked as hard as we could to cope with same. Now when a hearing re-scheduling would normally allow each party adequate time to re-boot its schedule accordingly, the Commission immediately re-set the hearing for nine days after the original hearing date at a time previously noted to be “impossible” by FPL and Staff’s reading of the Commission dockets.

19. Every party is due a reasonable opportunity to be heard, and to obtain and present substantial evidence. Florida Gas v. Hawkins, 372 So.2d 1118, 1120. A hearing must meet required due process standards. Citizens v. Mayo, 333 So.2d 1 (Fla. 1976). In Mayo, the Court found that effectively excluding the Office of Public Counsel by promising an appropriate hearing and then held a hearing that did not meet due process standards, such action was “plainly improper.” Id. at 7. The issues in our case regarding the accounting procedures, extraordinary circumstances, and the public interest are clearly disputed. “Due process permits expeditious procedures to

allow prompt disposition of matters where the facts cannot be reasonably disputed; but it is wrong to go outside of the record the way the majority have done.” Florida Gas at 1120.

20. The act of re-setting this hearing at a time that is impossible for much of CAIRC’s participants to attend, and a time that is oppressively inconvenient for CAIRC counsel, having relied on prior statements of Staff and FPL, will deny CAIRC its due process in this case.

21. Once again, CAIRC would point out that it has participated as honestly, diligently, and as cooperatively as it could manage while being handicapped by this compressed agenda. In these extraordinary circumstances, along with our very real and very singular burden of speaking for City of Vero Beach citizens who may be unable or unwilling to face the damaging pressures still placed on those of us who seek a voice on these issues, we hope the Commission will grant our Motion and set the hearing at a time that is reasonable for all parties.

22. This Motion is being made in a sincere case of necessity and not for the purposes of delay.

WHEREFORE, for the foregoing reasons, CAIRC respectfully requests that the Commission grant us a prudent and considerably important relief from re-setting of the hearing, and to order a rescheduling as soon as everyone can get their witnesses and schedules rearranged.

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been filed and forwarded via email this 12<sup>th</sup> day of October, 2018, to: PARTIES listed below.

LYNNE A. LARKIN, ESQ.  
5690 Hwy. A1A, Unit 101  
Vero Beach, FL 32963  
Phone: 772-234-5565  
lynnelarkin@bellsouth.net

By /s/ LYNNE A. LARKIN  
Florida Bar # 56693

#### PARTIES

Office of the General Counsel  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-0850  
cmurphy@psc.state.fl.us

Florida Power and Light  
700 Universe Blvd.  
Juno Beach, FL 33408  
bryan.anderson@fpl.com  
ken.rubin@fpl.com

Office of the Public Counsel  
111 West Madison Street, Suite 812  
Tallahassee, FL 32399-1400  
morse.stephanie@leg.state.fl.us  
rehwinkle.charles@leg.state.fl.us

City of Vero Beach, Florida  
J. Michael Walls  
4221 W. Boy Scout Blvd.  
Tampa, FL 33607  
mwalls@cfjblaw.com

Dylan Reingold  
Indian River County, Florida  
1801 27th Street  
Vero Beach, FL 32960  
dreingold@ircgov.com

Bruce May  
Indian River Shores, Florida  
Holland & Knight, LLP  
315 S. Calhoun St., Ste. 600  
Tallahassee, FL 32301  
bruce.may@hklaw.com



ATTACHMENTS:

<b>Subject:</b>	PSC docket 20170235-0236: Request for schedule adjustment, move date of final hearing
<b>From:</b>	Lynne Larkin (lynnelarkin@bellsouth.net)
<b>To:</b>	cmurphy@psc.state.fl.us; bryan.anderson@fpl.com; ken.rubin@fpl.com; citymgr@covb.org; jmoyle@moylelaw.com; kelly.jr@leg.state.fl.us; ken.hoffman@fpl.com; mqualls@moylelaw.com; khetrick@psc.state.fl.us; brianheady@msn.com;
<b>Date:</b>	Thursday, July 26, 2018 1:00 PM

Gentlemen and Ladies,

Having received the Commission's Order setting dates, there is only one conflict that I have which cannot be re-set, as I am traveling on October 11, 2018, to attend a family wedding. The festivities start on October 12, so travel needs to occur on the 11th, and of course all preparation/reservations have been made.

My apologies to all for the necessity to make any changes to the scheduled hearings and deadlines.

Before filing a motion on this point with the Commission, I am checking with all parties involved to see if anyone has objections to this request. I realize timelines are important, however, in addressing this very early in the proceedings, my hope is the next week is still available on the PSC docket.

Please let me know your agreement or objections as soon as possible, and I will relay those to the Commission along with my motion.

Sincerely,

Lynne Larkin, Esq.  
5690 Hwy. A-1-A, #101 Vero Beach, FL 32963  
772-234-5565

Attorney for the Civic Association of Indian River County, Inc.

<b>Subject:</b>	Re: PSC docket 20170235-0236: Request for schedule adjustment, move date of final hearing
<b>From:</b>	Jon Moyle (jmoyle@moylelaw.com)
<b>To:</b>	lynnelarkin@bellsouth.net;
<b>Cc:</b>	cmurphy@psc.state.fl.us; bryan.anderson@fpl.com; ken.rubin@fpl.com; citymgr@covb.org; kelly.jr@leg.state.fl.us; ken.hoffman@fpl.com; mqualls@moylelaw.com; khetrick@psc.state.fl.us; brianheady@msn.com;

---

Date: Thursday, July 26, 2018 1:15 PM

---

Hurricane hearings are scheduled for the following week so that may not be a viable option. FIPUG has conflicts on other some dates, so while I understand and respect the importance of the family event, I would not want alternative dates that present issues on our end. Regards, Jon  
jmoyle@moylelaw.com  
Moyle Law Firm, P.A.  
The Perkins House  
118 N. Gadsden St.  
Tallahassee, FL  
850-681-3828 (Voice)  
850-681-8788 (Fax)

Sent from my iPhone

---

Subject: RE: PSC docket 20170235-0236: Request for schedule adjustment, move date of final hearing

From: Rubin, Ken (Ken.Rubin@fpl.com)

To: lynnelarkin@bellsouth.net; jmoyle@moylelaw.com;

Cc: cmurphy@psc.state.fl.us; Bryan.Anderson@fpl.com; citymgr@covb.org; kelly.jr@leg.state.fl.us; ken.hoffman@fpl.com; mqualls@moylelaw.com; khetrick@psc.state.fl.us; brianheady@msn.com; mwalls@carltonfields.com;

Date: Thursday, July 26, 2018 4:43 PM

---

Dear Ms. Larkin and Mr. Moyle,

We have reviewed Ms. Larkin's initial request and your subsequent communications regarding the hearing scheduled for October 10 and 11, 2018. Ms. Larkin, while we understand your personal commitment, FPL objects to any delay of the current schedule and hearing dates. We take no position regarding the possibility of moving the hearing up to a date earlier that week.

Ken

Ken Rubin, Esq.  
Senior Counsel  
Florida Power & Light Company  
Direct: 561-691-2512  
Fax: 561-691-7135  
E-mail: ken.rubin@fpl.com

The transmission is intended to be delivered only to the named addressee(s) and may contain information that is confidential and/or legally privileged. If this information is received by anyone other than the named addressee(s), the recipient should immediately notify the sender by E-MAIL and by telephone (561) 304-5661 and permanently delete the original and any copy, including printout of the information. In no event shall this material be read, used, copied, reproduced, stored or retained by anyone other than the named addressee(s), except with the express consent of the sender or the named addressee(s).

<b>Subject:</b>	<i>RE: PSC docket 20170235-0236: Request for schedule adjustment, move date of final hearing</i>
<b>From:</b>	<i>Keith Hetrick (khetrick@psc.state.fl.us)</i>
<b>To:</b>	<i>lynnelarkin@bellsouth.net; mwalls@carltonfields.com; Ken.Rubin@fpl.com; jmoyle@moylelaw.com; Bryan.Anderson@fpl.com; citymgr@covb.org; ken.hoffman@fpl.com; mqualls@moylelaw.com; brianheady@msn.com; kelly.jr@leg.state.fl.us;</i>
<b>Cc:</b>	<i>kcowdery@PSC.STATE.FL.US; MHelton@PSC.STATE.FL.US; MFutrell@PSC.STATE.FL.US; BBaez@PSC.STATE.FL.US;</i>
<b>Date:</b>	<i>Friday, July 27, 2018 10:42 AM</i>

I have seen all of the emails on this from all of you, including those emails from this morning. If the hearing were to move from its currently scheduled time of Oct. 10-11 to Oct. 9-10 (back a day), I need to have some confirmation from all that there will be no issue with witness availability. Thank you.

**Keith Hetrick**

**General Counsel**

Florida Public Service Commission

850-413-6189

khetrick@psc.state.fl.us